U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 April 2004

BALCA Case No.: 2003-INA-148
ETA Case No.: P2001-NV-09529075/ET

In the Matter of:

DRYWALL SYSTEMS, INC.,
Employer,

on behalf of

JUAN MANUEL MUNGUIA,
Alien.

Appearances: Ricardo Marquez, Esquire
Las Vegas, Nevada
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a drywall company for the position of Painter, Construction. (AF 49-50).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On February 1, 2001, the Employer, Drywall Systems Inc., filed an application for alien employment certification on behalf of the Alien, Juan Manuel Munguia, to fill the position of Painter, Construction. The minimum requirement for the position was listed as two years experience in the job offered. (AF 49-50).

The Employer received eight applicant referrals in response to its recruitment efforts, seven of whom the Employer reported as uninterested based upon their failure to appear at a scheduled interview. The Employer reported that two of the seven applicants did not appear qualified for the position and the eighth applicant was not invited to interview. (AF 61-63).

A Notice of Findings ("NOF") was issued by the CO on November 4, 2002, proposing to deny labor certification based upon a finding that the Employer had failed to document lawful, job-related reasons for rejection of seven of the eight U.S. worker applicants. (AF 44-46). Citing the fact that the Employer rejected the U.S. workers for not responding to letters of invitation to interview, the CO noted that there was no evidence that the letters of invitation were actually sent. In addition, the CO observed that telephone numbers were indicated on each of the applicants' resumes, and questioned whether the Employer had shown good faith effort in contacting them by phone. Noting that each of the U.S. workers appeared qualified based upon a review of their resumes, the Employer was instructed to submit rebuttal that documented how each worker had been rejected solely for lawful, job-related reasons.

In Rebuttal, the Employer stated that each applicant was rejected as unqualified for the position because he did not possess the required ability, experience, or technique using special tools. (AF 31-33).

A Final Determination ("FD") denying labor certification was issued by the CO on December 23, 2002, based upon a finding that the Employer had failed to adequately

document lawful rejection of the U.S. applicants. (AF 29-30). In denying certification, the CO noted that the Employer's statement of recruitment results in its initial report clearly contradicted the statements made in Rebuttal, and that the Employer failed to address the issue of attempted contact of the U.S. applicants. (AF 31-33, 61-63).

The Employer filed a Request for Review by letter dated January 28, 2003, and the matter was referred to this Office and docketed on April 10, 2003. (AF 1-28). The Employer submitted a Statement of Position, dated June 23, 2003.

DISCUSSION

Twenty C.F.R. § 656.24(b)(2)(ii) states that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed. Twenty C.F.R. § 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. Twenty C.F.R. § 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker.

In the instant case, the Employer wanted to hire a Painter, Construction with two years experience in the job offered. The Employer received eight applicant referrals and initially reported that it had rejected seven of the eight applicants for failure to respond to a letter of invitation to interview. The Employer thereafter reported that the eight applicants were rejected because they were not qualified for the position.

While a U.S. applicant who only has general or related experience in the field of the position offered has been lawfully found to be not qualified where an employer has stated an unchallenged requirement of more specific experience, the burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997); *Marsha Edelman,* 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. §

656.2(b). Hence, where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Dearborn Public Schools,* 1991-INA-222 (Dec. 7, 1993)(*en banc*); *Gorchev & Gorchev Graphic Design,* 1989-INA-118 (Nov. 29, 1990)(*en banc*). Given this burden, and in light of the significant painting experience reflected in all but one of the applicants' resumes, the Employer was obligated to attempt to contact and further investigate the applicants' qualifications for the position. Summary rejection on the basis of their resumes alone was not appropriate.

The Employer initially indicated that it made an effort to contact seven of the eight U.S. workers who applied for the position, but reported that none of them responded to the letter of invitation to interview. Notably, the record reflects that four of the letters allegedly sent are dated July 2, 2001 with an interview date of July 6, 2001; given the July 4th holiday, conceivably the letters did not arrive before the scheduled interviews. (AF 64, 73, 77, 84). Similarly, the other letters allegedly sent were dated July 10, 2001 with scheduled interviews on July 13, 2001. (AF 67, 70, 75). The Employer did not report any effort at follow-up.

The Board in *M.N. Auto Electric Corp.,* 2000-INA-165 (Aug. 8, 2001)(*en banc*), held that the CO may not require an employer to use certified mail, return receipt requested, when contacting U.S. applicants, and that an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith. However, as further noted by the Board, "where there is no return receipt the employer has no way of knowing whether the letter was received." *Id.*

In this case, the Employer reported that none of the applicants responded to the letters of invitation to interview and the Employer does not know whether the letters were received. Presumably, an employer who has a *bona fide* opening it desires to fill would, in exercise of good faith, make additional efforts to contact these applicants again, either

by certified mail or by the telephone number provided on each of the applicants' resume. The Employer made no such efforts.

On this basis, the Employer has not met its burden to show that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work, in violation of 20 C.F.R. § 656.1, and accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.